UNITED STATES
v.
IMPERIAL GOLD, INC.

IBLA 81-1026 Decided May 28, 1982

Appeal from the decision of Administrative Law Judge Michael L. Morehouse, declaring 32 placer mining claims invalid. CA 5123.

Affirmed as modified.

1. Mining Claims: Discovery: Generally

Where a qualified mineral examiner testifies that he examined and took samples from the only exposed areas on contested mining claims, that his examination and the assay of those samples revealed no mineralization, and that he was of the opinion that a prudent person would not spend time, effort, and money believing he had a reasonable prospect of developing a valuable mine, a prima facie case of invalidity of the claims is established. Where the claimant submits unverified reports of mineralization and testifies that little work and no sampling have been done on the claims since he restaked them, the prima facie showing is not rebutted, and the claims are properly declared invalid.

2. Administrative Authority: Generally -- Constitutional Law: Generally -- Statutes

The Department of the Interior, as an agency of the executive branch of the Government, is not the proper forum to decide whether a statute enacted by Congress is constitutional.

3. Attorneys -- Mining Claims: Hearings

The Government is under no obligation to provide counsel for a mining claimant at

> an administrative hearing. Failure of the claimant to have counsel at a hearing into the validity of mining claims will afford the claimant no greater rights on appeal than if he had obtained counsel.

APPEARANCES: Darrell G. Hafen, President, Imperial Gold Corporation; Burton J. Stanley, Esq., Office of the Solicitor, Department of the Interior, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On June 28, 1978, the California State Office, Bureau of Land Management (BLM), filed a complaint against Imperial Gold, Inc., on behalf of the National Park Service (NPS), contesting the validity of 32 placer mining claims, the Amargosa Nos. 1 through 32, located in the Death Valley National Monument. The contest complaint alleged that mineral deposits had not been found within the boundaries of these claims so as to constitute a discovery within the meaning of the mining laws. Darrell G. Hafen, as President of Imperial Gold Corporation, answered this complaint by denying the allegation. 1/

A hearing was held before Administrative Law Judge Michael L. Morehouse on December 9, 1980, at which NPS and Hafen appeared and presented evidence. On August 10, 1981, Judge Morehouse issued a decision declaring the Amargosa Nos. 1 through 32 mining claims invalid. Hafen, on behalf of Imperial Gold Corporation, has appealed this decision.

A discovery of a valuable mineral deposit is essential to the validity of a mining claim located on public lands of the United States because the mere staking of a claim conveys no rights to the claimant until there is also shown to be discovery of a valuable mineral deposit within the limits of the claim. 30 U.S.C. § 23 (1976). Under the "prudent man test," a discovery of valuable minerals under Federal mining law exists only where the minerals found are of such a character that a person of ordinary prudence would be justified in the further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. United States v. Coleman, 390 U.S. 599 (1968); Chrisman v. Miller, 197 U.S. 313 (1905); Castle v. Womble, 19 L.D. 455, 457 (1894). This prudent man test has been complemented by the "marketability test" requiring a showing that the mineral in question can be presently extracted, removed, and marketed at a profit. United States v. Coleman, supra.

1/ The contest complaint was initially directed to Imperial Gold, Inc., a California corporation. A representative of that corporation returned the complaint stating that it had no interest in the mining claims at issue. The complaint was redirected to Darrell G. Hafen of Imperial Gold, Inc., in Utah on the advice of the National Park Service. In his response to the complaint and in various other documents Hafen asserts that he is president of Imperial Gold Corp., a Nevada corporation. Although advised of the above, Administrative Law Judge Morehouse retained the "Imperial Gold, Inc.," designation for the contest. During the hearing Hafen added that Fort Knox Gold Corp., Trans-World Securities, Dixie Power & Water, and Hafen personally, all had an interest in the claims as well (Tr. 3-6).

Mineralization that only warrants further prospecting or exploration in an effort to ascertain whether sufficient mineralization might be found to justify development does not constitute a valuable mineral deposit. A valuable mineral has not been found simply because the facts might warrant a search for such a deposit. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974); United States v. Porter, 37 IBLA 313 (1978). In order to have a valid mining claim, valuable minerals must be exposed in sufficient quantities to justify development of the claim through actual mining operations. United States v. Marion, 37 IBLA 68 (1978).

[1] When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 852 (10th Cir. 1979); United States v. Springer, 491 F.2d 239 (9th Cir.), cert. denied, 419 U.S. 834 (1974); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). Both at the hearing (Tr. 12) and in his decision Judge Morehouse stated that appellant's burden was to show by a preponderance of the evidence that the mining claims were valid. That is an inaccurate statement of the law. Absent a patent application, there is no requirement that a mining claimant show that a contested claim is valid; rather, the claimant's burden is to preponderate on the issues raised by the evidence. United States v. Hooker, 48 IBLA 22, 23-27 (1980). Although Judge Morehouse misstated the applicable standard, his decision was not entirely based on the incorrect standard since he concluded that appellant had failed either to overcome the Government's case or to show by a preponderance of the evidence that the contested claims were valid. Nevertheless, it is axiomatic that this Board is possessed with plenary authority to examine the record de novo, applying the correct standard, and we shall do so. See Morris v. Andrus, 593 F.2d 851, 854-55 (9th Cir. 1979); United States v. Gassaway, 43 IBLA 382, 388 (1979).

Judge Morehouse summarized the evidence presented at the hearing and made certain findings as follows:

> The claims are located in the southern end of Death Valley National Monument and are clumped in two groups Nos. 1 through 20 to the east and Nos. 21 through 32 to the west (see Ex. G-2). Mr. Amos F. Klein, Jr., a geologist employed by the National Park Service, testified that he overflew both groups of claims on February 8, 1978, and landed at several locations on the east group of claims to properly orient himself. He stated the west group, Nos. 21 through 32, were largely under water and there was no evidence of any claim markings or work on this group. On February 11, 1978, he examined the east group, Nos. 1 through 20, on the ground and found several dozer cuts and pits but only two principal dozer cuts on Claim Nos. 5 and 18. Mr. Hafen had been notified as to the date of this examination but was not present. Mr. Klein took one sample from each of the dozer cuts on Claim Nos. 5 and 18 which were processed by amalgamation and fire assay. The results showed nil gold (see Ex. G-5, G-5A). Mr. Klein stated that the area of the claims is generally made up of river sands

and based on his examination of the claims and the assay results was of the opinion that a prudent man would not spend his time, effort, and money with a reasonable prospect of developing a valuable mine.

Mr. Hafen testified that he acquired the claims from a Mr. Howe in the early 1970's. The claims were subsequently acquired by contestee corporation, of which he is President. The claims were evidently prospected in the 1930's and, at least according to Mr. Hafen, contain 3 to 11 billion dollars of gold per section. This estimate is evidently based on a report by one David K. Jordt (Ex. R-1), which is a summary of various prospecting reports dated between 1936 and 1953 (see Ex. R-2). Exhibits R-1 and R-2 were without foundation and not properly authenticated and were received in evidence over the government's objection as background material and because Mr. Hafen was not represented by counsel. I can give these reports little, if any, weight. Even if these reports are taken at face value, at best they show the claims to be a good prospect and further exploration would be needed to delineate those areas of the claims where operations might be located. Also, it was noted in the California Journal of Mines and Geology, Volume 49, Nos. 1 and 2, dated January to April, 1953:

> The claims are located on Amargosa River covering five miles along the river elevation 356 feet. Owner Harry D. Mauger * * *, Burbank, California and Frank G. Howe, Los Angeles. The gold occurs in a very fine state and unconsolidated sands and gravel.
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> Depth of the gravel is about 40 feet. Bedrock is shale and limestone. In 1932 and 1933 the property was under option to H. F. Alexander Exploration Company. This company prospected the area with shafts and drill holes and has reported an average value of gravel was 55 cents per cubic yard on the basis of assays from 1,500 samples.
>
> Tests to determine the method of treatment was made but it is stated that due to the fine character of the gold associated with heavy black sands, no satisfactory method of recovery of gold was made. The property is idle. (Tr. 60).

The claims have remained idle up to the present date.

Mr. Hafen stated that he was refused permission to further explore the claims in early 1976 prior to their withdrawal from mineral entry. It is the government's position that, at best, Mr. Hafen would have been required to get a permit prior to working on the claims. In any event, it is noted that employees of Mr. Hafen restaked the claims in 1972 or 1973 and the dozer work from which the government samples were taken was done in

> 1973 or 1974. In addition, other work was done on the claims in 1975, Mr. Hafen claims to prepare for drilling. Taking these factors into consideration, it is concluded that Mr. Hafen had ample time and opportunity to sample and prove a discovery on any one or all of the claims in question. The fact that he did not do so, together with the fact that in spite of the favorable nature of the unsubstantiated reports, the claims have remained idle all these years certainly lead to the conclusion that a reasonable man would not spend his time and money in developing them prior to September 1976.

Based on a thorough review of the record of this contest, we find that this summary accurately reflects the testimony of the witnesses and identifies the evidence relevant to the issue of discovery. The first question before us is whether the Government established a prima facie case of no discovery.

The longstanding rule is that the Government establishes such a prima facie case when a qualified Government mining engineer testifies that he has examined the claim and found the mineral values insufficient to support the discovery of a valuable mineral deposit. United States v. Hooker, supra at 28; United States v. Winters, 2 IBLA 329, 335-36, 78 I.D. 193, 195 (1971). We agree with Judge Morehouse that the testimony of Amos Klein was sufficient to establish the Government's prima facie case.

Next we turn to the question of whether appellant presented sufficient evidence to overcome the Government's prima facie showing of no discovery of a valuable mineral. As earlier stated, the prudent man test requires a showing that the minerals found are of such character that a person of ordinary prudence would be justified in further expenditure of labor and means with a reasonable prospect of success in developing a valuable mine. Appellant presented no evidence of the existence of any gold on the claims, based on his independent sampling of the claims, or of the likelihood that he could successfully develop the claims. He instead relied solely on various prospecting reports prepared many years ago about the claims. In his statement of reasons for appeal appellant contends that the claims should not have been declared invalid because these geologic and engineering reports show minerals are present on the claims and that the claims have been maintained since the 1930's. He adds that the yearly taxes on the claims have also been paid. We agree with Judge Morehouse that the nature of the evidence in the documents was not sufficient to establish a discovery, and at most they might prompt a reasonable person to further prospect and explore in order to locate the minerals identified in the reports. We note that the taxes were apparently paid based on appellant's possessory interest in the unpatented claims (Tr. 74). Such payment is not evidence that the claims contained minerals. In the absence of any assays rebutting the Government's reports of no gold and of any evidence challenging Klein's opinion, we conclude that appellant failed to present sufficient evidence to overcome the Government's prima facie case.

Hafen presented two additional arguments on appeal.

[2] He urges that the Mining in the Parks Act, 16 U.S.C. §§ 1901-1912 (1976), is unconstitutional and that NPS had a duty to determine the validity of the contested claims before passage of this Act. The Department of the

Interior, as an agency of the executive branch of Government, is without jurisdiction to consider whether or not a statute enacted by Congress is constitutional. Alex Pinkham, 52 IBLA 149 (1981), and cases cited therein. Section 3 of the Act, 90 Stat. 1342, closed Death Valley National Monument to entry and location under the mining laws by repealing the Act of June 13, 1933, 43 Stat. 139. The Act also imposed a 4-year moratorium on surface operations for the purposes of mineral exploration and production in Death Valley beginning September 28, 1976, and directed the Secretary of the Interior to determine the validity of any unpatented mining claims located in the Monument. 16 U.S.C. §§ 1903, 1905 (1976). Contrary to appellant's assertion, NPS had no duty to determine the validity of the contested claims before passage of this Act. The effect of the Act was to require mining claim owners to establish that discovery had been made on their claims as of the date of the withdrawal. See Cameron v. United States, 252 U.S. 450 (1920). The inability of appellant to work his claims during the moratorium has no impact on their validity because discovery of a valuable mineral must be shown to have existed as of September 28, 1976. United States v. Kuretich, 54 IBLA 124 (1981).

[3] Finally, appellant alleges that he was under a hardship and was disadvantaged because he could not afford counsel. The Department is not obliged by the United States Constitution or any statute to furnish counsel for a party to an administrative hearing. United States v. Long, 43 IBLA 150 (1979). It was appellant's responsibility to obtain counsel, and his failure to do so affords him no greater rights on appeal than if he had had counsel. Eldon Brinkerhoff, 24 IBLA 324, 83 I.D. 185 (1976). We note that every attempt was made to accommodate appellant's problems during the proceedings. Judge Morehouse generously counseled appellant as to his rights to cross-examine, to present evidence, and to participate fully in the hearing (Tr. 11-13, 16, 69-70), and appellant in fact did participate fully.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

Bernard V. Parrette
Chief Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Anne Poindexter Lewis
Administrative Judge